2008

State of Utah v. Frank August Marrone : Brief of Appellant

Utah Court of Appeals

Case No. 20080810-CA

IN THE

UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellant,

vs.

FRANK AUGUST MARRONE,
Defendant/Appellee.

Brief of Appellant

An appeal from a final order dismissing the charges against Defendant, which followed an order granting a motion to suppress, in the Third Judicial District Court of Utah, Summit County, the Honorable Bruce C. Lubeck presiding.

JEFFREY S. GRAY (5852)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
Utah Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180

GERRY D'ELIA
7620 Royal Street East, Ste. 202
P.O. Box 626
Park City, UT 84060

Counsel for Appellant

PAUL R. CHRISTENSEN
Summit County Attorney

Counsel for Appellee

Oral Argument Requested

Case No. 20080810-CA

IN THE

UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellant,

vs.

FRANK AUGUST MARRONE,
Defendant/Appellee.

Brief of Appellant

An appeal from a final order dismissing the charges against Defendant, which followed an order granting a motion to suppress, in the Third Judicial District Court of Utah, Summit County, the Honorable Bruce C. Lubeck presiding.

JEFFREY S. GRAY (5852)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
Utah Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180

PAUL R. CHRISTENSEN
Summit County Attorney

Counsel for Appellee

GERRY D'ELIA
7620 Royal Street East, Ste. 202
P.O. Box 626
Park City, UT 84060

Counsel for Appellant

Oral Argument Requested

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

CONSTITUTIONAL PROVISIONS AND STATUTESULES

Case No. 20080810-CA

IN THE

UTAH COURT OF APPEALS

STATE OF UTAH,
Plaintiff/Appellant,

vs.

FRANK AUGUST MARRONE,
Defendant/Appellee.

Brief of Appellee

STATEMENT OF JURISDICTION

The State appeals from a final order of dismissal, which followed an order granting Defendant's motion to suppress. This Court has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2)(d) (West Supp. 2008).

STATEMENT OF THE ISSUE

Issue. Was Defendant's voluntary consent to search his rented vehicle, given after the detention ended, obtained by police exploitation of prior illegality?

Standard of Review. The court's factual findings are reviewed for clear error. *State v. Krukowski*, 2004 UT 94, ¶ 11, 100 P.3d 1222. The court's legal conclusions are reviewed non-deferentially for correctness, including its application of the legal standard to the facts. *State v. Brake*, 2004 UT 95, ¶ 11, 103 P.3d 699.

Preservation. Defendant raised this issue below in a motion to suppress, which was opposed by the State. R. 39-40, 46-54, 67-70. After holding an evidentiary hearing and taking argument on the matter, the district court granted the motion to suppress in a memorandum decision. *See* 73-84, 93.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

U.S. Const. amend. IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

For conduct occurring on 8 November 2007, Defendant was charged by Information with (1) possession of marijuana with intent to distribute, a second degree felony, (2) possession of drug paraphernalia, a class B misdemeanor, and (3) speeding, a class C misdemeanor. R. 1-3. Following a preliminary hearing, a magistrate bound Defendant over to stand trial. R. 35-36; R. 93: 1-31. Defendant thereafter moved to suppress the evidence seized during the traffic stop. R. 39-40, 46-54. After taking evidence and considering the parties' written and oral arguments, the trial court granted the motion to suppress in a written memorandum decision. R. 73-84 (Addendum B). The case was thereafter dismissed on the State's motion and the State timely appealed. R. 85-89.

STATEMENT OF FACTS

At the time of the stop at issue in this case, Trooper Michael Bradford had been with the Utah Highway Patrol (UHP) for three years; he served in the San Juan County Sheriff's Office during the previous ten years. R. 93: 2, 55. He was a member of UHP's Criminal Interdiction Team, which actively works Utah's federal highways to identify and apprehend those involved in criminal activity, including drug traffickers. R. 93: 2, 35-36, 45, 69-70. In addition to his POST training, Bradford completed all four phases of the Desert Snow program, which provides specialized training in highway interdiction techniques and methods. *See* R. 93: 36, 47-48, 21. He also received specialized interdiction training from Sergeant Steve Salas, one of Utah's top interdiction troopers, and worked nine months on I-70. R. 93: 48. In his three years of interdiction service, Bradford had more than 300 drug seizures, seventeen or eighteen of which involved large quantities of trafficked drugs. R. 93: 50-52.

* * *

On November 8, 2008, Bradford and several other troopers on the Criminal Interdiction Team were working I-80 in Summit County. R. 93: 35. While monitoring eastbound traffic from his parked patrol car, Bradford clocked Defendant driving an SUV at 85 m.p.h. – 20 m.p.h. over the posted speed limit. R. 93: 36-37, 52 (R.74:¶¶1-2). Bradford stopped Defendant at milepost 148. R. 93: 36-37 (R.74:¶1). Defendant immediately acknowledged that he was speeding

and apologized. R. 93: 38, 57 ((R.74:¶2). Bradford advised Defendant of his speed and requested his driver's license, registration, and proof of insurance. R. 93: 38, 57-58 (R.74:¶2). Defendant provided the requested documentation and also a rental agreement for the vehicle. R. 93: 37, 58, 69 (R.74:¶2).

While Defendant was retrieving the documentation, Bradford observed numerous items inside the vehicle suggesting to Bradford, based on his training and experience, that Defendant may be trafficking narcotics. R. 93: 55-56, 61-62. The SUV had a "lived in" look to it. R. 93: 37, 62 (R.74:¶3). A Camelback water hydration system was attached to the back of the driver's seat for easy access by the driver. R. 93: 5-6, 37, 62 (R.74:¶3). Also in the vehicle were a lot of snacks, a large blue cooler, and a case of Red Bull energy drinks. R. 93: 37, 62 (R.74:¶3). These items were consistent with the behavior of drug traffickers who are trying to "get from Point A to Point B" within a specific timeframe, without the need of making any motel stops. R. 93: 38-39, 62, 65-66. Bradford also saw, tucked between the driver's seat and console, a package of incense sticks, which are frequently used by drug traffickers to mask the smell of drugs, but are seldom seen in rental vehicles. R. 93: 6, 37-38, 62 (R.74:¶3). The rental status of the SUV also added to Bradford's suspicion because drug couriers frequently use rental cars to avoid forfeiture of personal vehicles. R. 93: 38, 69.

Sometime during this initial encounter, Bradford asked Defendant where he was coming from and where he was going. R. 93: 39, 58-61, 83-84 (R.74-75:¶4). Defendant said he had flown to California from Florida to help his mother during the California brush fires and was now returning to Florida. R. 93: 39 (R.75:¶4). However, he was unable to provide Bradford with his mother's address, which raised the trooper's suspicion. R. 93: 39. After handing Bradford the vehicle documentation, Defendant joined Bradford in his patrol car while Bradford gathered additional information needed to complete the citation. R. 93: 71, 77-78 (R.75:¶¶4-5). Upon entering the car, Bradford radioed for backup and ran Defendant's information through dispatch. R. 93: 71, 78 (R.76-77:¶8).

"[W]hile [Defendant's] information [was] being run" through dispatch, Bradford asked Defendant for other information necessary to complete the citation "and then [he] also asked him about his travels." R. 93: 78-79.[1] Defendant explained that his mother had driven him to Reno, Nevada, where he then rented the SUV. R. 93: 64, 79 (R.75:¶6). Bradford asked Defendant why he was driving back to Florida, rather than flying. R. 93: 39. Defendant explained that "he was actually going to stop in Wyoming because he had a hunt he was going on" with friends from North Carolina. R. 93: 39-40, 64, 78-79 (R.75-76:¶6). Knowing that hunting season was over in Wyoming, Bradford asked Defendant

[1] The court found that "the timing [of this questioning] was not clarified by the State." R.75:¶5. The State challenges that finding, *infra*, at 19.

more about the hunting trip. R. 93: 39, 64 (R.75:¶5). Defendant, however, could "not tell [Bradford] anything about this hunt in Wyoming." R. 93: 64. He did not know "what type of hunt he was going on, had no idea what he was going to hunt, and did not have a name [of] an outfitter." R. 93: 39, 64 (R.75:¶6). When asked whether he had a rifle or bow, Defendant said he had neither and asked whether the outfitters supplied the weapon. R. 93: 39 (R.76:¶6).

While conversing with Defendant in the patrol car, dispatch radioed Bradford, advising him of Defendant's extensive criminal history for narcotics trafficking. R. 93: 41, 63 (R.76:¶7). Upon hearing this, Defendant volunteered to the trooper, "[Y]ou know, I have nothing to hide, you can search my vehicle if you'd like." R. 93: 40, 79-80 (R.76:¶7). Bradford ignored Defendant's offer and continued to write the citation. R. 93: 9. While Bradford was filling out the citation, Sergeant Steve Salas, who had a drug detection dog with him, and Lieutenant Chris Smith, arrived as backup, but they remained in their patrol cars. R. 93: 12, 71-72 (R.77:¶8).

After completing the citation, Bradford handed the ticket to Defendant, returned his license and vehicle documentation, and told him to "drive careful" and have a good day. R. 93: 40, 73, 79 (R.76:¶8). Defendant exited the patrol car, closed the door behind him, and began walking back to the SUV. R. 93: 40, 73 (R.76:¶8). Bradford then also exited his patrol car, walked up to Defendant,

meeting him between the two vehicles, and asked "if [he] could ask some additional questions." R. 93: 40, 73-74 (R.76:¶8). Defendant said, "Yeah, go ahead." R. 93: 40, 73-75 (R.76:¶8). Bradford asked Defendant whether he was trafficking "any cocaine, marijuana, [or] methamphetamine in the vehicle." R. 93: 40, 75 (R.76:¶8). Defendant said he was not and again invited Bradford to "go ahead and look, bring a dog." R. 93: 41, 75 (R.76:¶8).

After obtaining Defendant's consent, Bradford searched the SUV and found two spare tires covered by a blanket in the SUV's cargo compartment. R. 93: 9-11, 41-42, 72 (R.77:¶9). When questioned about the tires, Defendant said they were going to be mounted on his camper in Florida. R. 93: 42 (R.77:¶9). The tires, however, were different sizes, had different bolt configurations, and were in poor condition. R. 93: 42 (R.77:¶9). Bradford also noticed that a fresh sealant was dried onto the tires' sidewalls, suggesting that they had recently been mounted. R. 93: 42 (R.77:¶9). After an echo test confirmed that some substance other than air was inside the tires, Bradford opened them up and found 36 packages of high grade marijuana. R. 93: 43 (R.77:¶9). The troopers found 17 more packages of marijuana in a third tire, which was attached to the undercarriage of the vehicle. R. 93: 43 (R.77:¶9). In all, some 40 pounds of marijuana was seized. R. 93: 43-44. Sgt. Salas also ran the dog around the vehicle, but the dog did not alert on any other drugs. R. 93: 42, 71 (R.77:¶9).

SUMMARY OF ARGUMENT

The district court correctly concluded that Defendant voluntarily consented to a search of his rented vehicle. However, it incorrectly concluded that the consent was obtained by police exploitation of prior illegality. Contrary to the conclusion of the district court, there was no prior illegality. After stopping Defendant for speeding, Trooper Bradford questioned Defendant about his travel plans. Those questions were justified because there was reasonable suspicion Defendant was trafficking drugs.

Bradford observed incense sticks, which he testified are rarely seen in rental cars, but frequently used by drug traffickers. He also testified that drug couriers are often on a stringent timeline, requiring them to travel long distances without stopping. He saw indicia of such a purpose, including energy drinks and a Camelback hydration system. The urgency, and suspicious nature of this, was highlighted by the fact the hydration system was strapped to the driver's seat to permit ready access. In addition, Bradford knew that drug traffickers often used rental vehicles to avoid forfeiture of personal vehicles. These facts, viewed in their totality, supported a reasonable suspicion to justify the brief inquiry into Defendant's travels. In any case, the travel questions were reasonably related to the initial traffic stop. Moreover, the questions did not

measurably extend the duration of the stop, and thus did not render the encounter unlawful.

Where the initial travel questions were permissible, so too were the follow-up questions in the patrol car. Indeed, the district court correctly concluded that Defendant's answers to the initial questions provided reasonable suspicion justifying continued detention and questioning.

Even assuming, arguendo, that the travel questions rendered the detention unlawful, Defendant's subsequent consent was not the product of that illegality. Although only a few seconds passed between the supposed illegality and the detention, the questioning was not flagrantly unlawful. Nor did it in any way contribute to Defendant's consent to search. And most significantly, when consent was given, the stop had de-escalated to a consensual encounter. Trooper Bradford handed Defendant the citation, returned his documentation, and told him to have a good day and drive safely. And consistent with that de-escalation, Defendant exited the car and began walking back to his car. This intervening circumstance represented a clear break in any causal chain between the travel questions and Defendant's otherwise voluntary consent. Moreover, Defendant himself spontaneously invited the trooper to search his vehicle. Under these circumstances, it cannot be said that the consent was the product of any unlawful questioning.

ARGUMENT

DEFENDANT'S VOLUNTARY CONSENT TO SEARCH HIS VEHICLE WAS NOT OBTAINED BY POLICE EXPLOITATION OF PRIOR ILLEGALITY

"[O]ne of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). A consent search "is valid only if '(1) [t]he consent was given voluntarily, and (2) the consent was not obtained by police exploitation of prior illegality.'" *State v. Hansen*, 2002 UT 125, ¶ 47, 63 P.3d 650 (citations omitted). In this case, the district court correctly concluded that Defendant's consent to search was voluntary. R.81:¶5. However, it incorrectly concluded that the consent was obtained by police exploitation of a prior illegality and suppressed the evidence. That decision should be reversed.

* * *

In determining whether a consent was "obtained by police exploitation of prior illegality," the Court must, as a threshold matter, determine whether there was, in fact, a "prior illegality." If the Court concludes there was no illegality, there can be no taint and the inquiry ends. *See United States v. Manbeck*, 744 F.2d 360, 384 (5th Cir. 1984) (holding that "[i]n the absence of a primary illegality there can be no taint"), *cert. denied*, 469 U.S. 1217 (1985). If, on the other hand, the Court concludes there was a prior illegality, it must then determine whether

the consent was obtained by exploiting that illegality. Contrary to the district court's conclusion below, there was no prior illegality in this case. Even if there were, Trooper Bradford did not exploit that illegality to obtain consent.

A. THE TRAFFIC STOP OF DEFENDANT AND RESULTING DETENTION WERE LAWFUL.

Like the investigatory detention discussed in *Terry v. Ohio*, 392 U.S. 1 (1968), a traffic stop "must be 'justified at its inception, and . . . reasonably related in scope to the circumstances which justified the interference in the first place.'" *Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177, 185 (2004) (quoting *Terry*, 392 U.S. at 19-20). "Once the purpose of the initial stop is concluded, . . . the person must be allowed to depart." *State v. Hansen*, 2002 UT 125, ¶ 31, 63 P.3d 650. Any further detention is unlawful "unless [the] officer has probable cause or a reasonable suspicion of a further illegality." *Id.*

1. The stop was justified at its inception.

In this case, Trooper Bradford clocked Defendant traveling 85 m.p.h. in a 65 m.p.h. zone. R. 93: 36-37, 52 (R.74:¶¶1-2). The stop for speeding was, therefore, justified at its inception. *See Hansen*, 2002 UT 125, ¶ 30 (holding that a stop is justified at its inception when made in response to a traffic violation committed in the officer's presence). Defendant did not contend otherwise below. *See* R.49, R.77:¶1. Accordingly, the initial stop is not at issue on appeal.

2. The trooper's questions about Defendant's travels did not exceed the permissible scope or duration of the stop.

At some point during his conversation with Defendant through the driver's side window of the SUV, Trooper Bradford asked Defendant "where [he] was coming from and where he was going." R.74-75:¶4. Defendant told him that "he had flown from Florida to California to help his mother with the California fires recently occurring there and was driving back to Florida" in the SUV he had rented in Reno, Nevada. R.75:¶4; R.79:¶4. Unsatisfied with the State's evidence regarding the timing of the travel questions, the district court found that they "necessarily delayed the traffic stop." R.78-79:¶3. The court then concluded that the travel questions converted the encounter into an unlawful detention because the facts and circumstances confronting the trooper at the time did "not amount to reasonable suspicion" of drug trafficking, "warrant[ing] further detention and further questions." R.79:¶3; R.81-82:¶¶8-9. The district court's ruling is incorrect.

* * *

As in any *Terry* stop, officers making a traffic stop are required to "diligently pursue[ ] a means of investigation that [is] likely to confirm or dispel their suspicions quickly." *United States v. Sharpe*, 470 U.S. 675, 686 (1985). For example, officers "'may request a driver's license and vehicle registration, conduct a computer check, and issue a citation.'" *State v. Lopez*, 873 P.2d 1127,

1132 (Utah 1994) (quoting *State v. Robinson*, 797 P.2d 431, 435 (Utah App. 1990)); *see also State v. Brokmeyer*, 2000 UT App 303U (recognizing that officers may request proof of insurance). They also may run a warrants check, "so long as it does not significantly extend the period of detention beyond that reasonably necessary to [complete the stop]." *Lopez*, 873 P.2d at 1133. And as "an essential part of [any] police investigation[ ]," *Hiibel*, 542 U.S. at 185, officers may pose reasonable questions designed to confirm or dispel the suspicion giving rise to the stop. *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993).

To satisfy the reasonable suspicion standard, an officer must be able to point to "specific and articulable facts which, taken together with rational inferences from those facts," support a reasonable belief that "criminal activity may be afoot." *Terry*, 392 U.S at 21, 30. "Although an officer's reliance on a mere 'hunch' is insufficient to justify a stop, the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard." *United States v. Arvizu*, 534 U.S. 266, 274 (2002) (quoting *Terry*, 392 U.S. at 27). Accordingly, "[a] determination that reasonable suspicion exists . . . need not rule out the possibility of innocent conduct." *Id.* at 277, 122 S.Ct. at 753.

When assessing reasonable suspicion, reviewing courts "must look at the 'totality of the circumstances' of each case to see whether the detaining officer

ha[d] a 'particularized and objective basis' for suspecting legal wrongdoing." *Id.* at 273 (citations omitted). Courts should "'judge the officer's conduct in light of common sense and ordinary human experience." *State v. Beach*, 2002 UT App 160, ¶ 8, 47 P.3d 932 (quoting *United States v. Williams*, 271 F.3d 1262, 1268 (10th Cir. 2001)). Courts must also give "due weight" to an officer's assessment of "the cumulative facts," which might well elude a person without the officer's experience and specialized training. *State v. Warren*, 2003 UT 36, ¶¶ 20, 14, 78 P.3d 590. Finally, courts must be careful to assess the suspicion in light of the whole picture, "avoid[ing] the temptation to divide the facts and evaluate them in isolation from each other." *Id.* at ¶ 14.

The facts and circumstances confronting Trooper Bradford at the time were sufficient to support a reasonable belief of further criminal activity, justifying the brief inquiry into Defendant's travel plans and the purpose of his trip. The vehicle was a rental out of Reno, Nevada, but had California plates. *See* R. 93: 36-37, 58, 69. Bradford observed a package of incense sticks, which he testified are often used by drug traffickers to mask the smell of drugs, but seldom seen in rental vehicles. R. 93: 6, 37-38, 62 (R.74:¶3). Bradford also observed in the vehicle a Camelback hydration system, lots of snacks, a large blue cooler, and a case of Red Bull energy drinks. R. 93: 37, 62 (R.74:¶3). Bradford testified that based on his experience and training, these items were

consistent with the behavior of drug traffickers who are trying to "get from Point A to Point B" within a specific timeframe, without the need of making any motel stops. R. 93: 38-39, 62, 65-66. The apparent urgency and suspicious nature of Defendant's trip was accentuated by the fact that the Camelback hydration system was attached to the driver's seat for ready access by the driver. R. 93: 5-6, 37, 62 (R.74:¶3). Added to these observations, Trooper Bradford knew that drug traffickers will often rent cars, instead of using their own, to avoid forfeiture should they be caught. R. 93: 38, 69.

Undoubtedly, the foregoing facts were susceptible to an innocent explanation. However, as in *Arvizu*, "[t]aken together, . . . they sufficed to form a particularized and objective basis" for brief inquiry into Defendant's travels. *Arvizu*, 534 U.S. at 277-78.

In any event, Trooper Bradford's questions about Defendant's itinerary needed no justification independent of the initial stop itself. As recognized by the Tenth Circuit Court of Appeals, "[t]ravel plans typically are related to the purpose of a traffic stop because the motorist is traveling at the time of the stop." *United States v. Holt*, 264 F.3d 1215, 1221 (10th Cir. 2001); *accord United States v. Alcaraz-Arellano*, 441 F.3d 1252, 1258 (10th Cir. 2006). The Tenth Circuit noted that "a motorist's travel history and travel plans may help explain, or put into context, why the motorist was weaving (if tired) or speeding (if there was

an urgency to the travel)." *Holt*, 264 F.3d at 1221. Moreover, such information may assist an officer in determining whether to issue a citation or a warning. For example, an officer might choose to exercise his or her discretion to issue a warning, rather than a citation, upon learning that the driver is rushing to the hospital or responding to an emergency.[2]

Other courts have likewise recognized that routine questions about a driver's travel plans are appropriate in a traffic stop. *See United States v. Dunbar*, 553 F.3d 48, 56 (1st Cir. 2009) (holding that "routine questioning about itinerary, 'even when not directly related to the violations that induced the stop in the first place[,]' does not escalate the stop beyond the scope of an investigative stop") (citation omitted); *United States v. Peralez*, 526 F.3d 1115, 1119 (8th Cir. 2008) (holding that an officer may "'inquir[e] about the occupants' destination, route, and purpose'" during a traffic stop) (citation omitted); *United States v. Ellis*, 497 F.3d 606, 613-14 & n.1 (6th Cir. 2007) (recognizing that an officer "'free to ask traffic-related questions about a driver's identity, business and his travel plans during the course of a traffic stop'") (citation omitted); *United States v. Fishel*, 467 F.3d 855, 857 (5th Cir. 2006) (holding that an officer "may also ask about the

[2] It is widely recognized that officers may choose to issue a warning rather than a citation. *See, e.g., State v. Mogen*, 2002 UT App 235, 52 P.3d 462 (not questioning officer's issuance of a warning rather than a citation following a legal traffic stop); *State v. Gronau*, 2001 UT App 245, 31 P.3d 601 (same); *State v. Patefield*, 927 P.2d 655 (Utah App. 1996) (same).

purpose and itinerary of the driver's trip" during a traffic stop); *United States v. Givan*, 320 F.3d 452, 459 (3rd Cir. 2003) (holding that "questions relating to a driver's travel plans ordinarily fall within the scope of a traffic stop"); *State v. Voichahoske*, 709 N.W.2d 659, 668 (Neb. 2006) (holding that an officer may ask the driver during a traffic stop "about the purpose and destination of his or her travel"); *People v. Ocasio*, 652 N.E.2d 907, 909 (N.Y. 1995) (recognizing that an officer may pose questions regarding "identity, address or destination").

Even if Trooper Bradford's questioning about Defendant's travel plans had not been justified, the minimal delay occasioned by that questioning did not render the ensuing detention unlawful. The district court incorrectly assumed that any delay caused by questioning outside the scope of the stop rendered the detention unlawful, unless supported by reasonable suspicion. *See* R.78-79:¶3. That is not the case.

The broad language used in some cases might be read to suggest that any such delay renders the detention unlawful. *See, e.g., State v. Baker*, 2008 UT App 115, ¶ 11, 182 P.3d 935 (holding that questions unrelated to the initial stop are permissible "only if they do not add to the delay already lawfully experienced"), *cert. granted*, 199 P.3d 367 (Utah 2008). But as recently explained by the U.S. Supreme Court, the rule is not that broad:

> An officer's inquiries into matters unrelated to the justification for the traffic stop . . . do not convert the encounter into something

> other than a lawful seizure, so long as those inquires do not *measurably extend* the duration of the stop.

Johnson, — U.S. —, 129 S.Ct. at 781, 788 (2009) (emphasis added).

In this case, Trooper Bradford only asked a few travel questions while talking to Defendant at the SUV. Those questions, and the answers provided by Defendant, could not have extended the stop to any measurable degree. As a result, the trooper's travel questions did "not convert the [traffic stop] into something other than a lawful seizure." *Id.*

3. Because the questioning at the SUV about Defendant's travels was reasonable, the follow-up questioning inside the patrol car was also reasonable.

The district court found that Trooper Bradford's follow-up questions in the patrol car made the stop "even more 'unlawful'" because they "built upon the earlier improper questions and delay." R.80-82:¶¶4, 8. But as explained above, the earlier questioning at the SUV did not impermissibly exceed the proper scope or duration of the stop.

Moreover, as correctly recognized by the district court, Defendant's answers to Trooper Bradford's questions at the SUV "were clearly suspicious to a reasonable person" and "provide[d] reasonable suspicion to justify further detention" and questioning. R.79:¶3. In sum, the trooper's subsequent questioning of Defendant in the patrol car was a permissible response "to the emerging tableau—the circumstances originally warranting the stop, informed

by what occurred, and what [Trooper Bradford] learned, as the stop progressed." *United States v. Taylor*, 511 F.3d 87, 90 (1st Cir. 2007) (quotations and citations omitted).

* * *

Because the stop and resulting detention were lawful, Defendant's subsequent consent was not preceded by an illegality. Accordingly, there can be no taint and this Court should reverse.[3]

B. EVEN ASSUMING A PRIOR ILLEGALITY, DEFENDANT'S CONSENT, GIVEN AFTER THE STOP ENDED, WAS NOT OBTAINED BY POLICE EXPLOITATION OF THAT ILLEGALITY

Even assuming, arguendo, that the questioning about Defendant's travels rendered the detention unlawful, the subsequent consent given by Defendant was not obtained by police exploitation of that illegality.

---

[3] The district found that the follow-up questions in the patrol car delayed the stop. R.76:¶7. That finding was clearly erroneous. The district court found that Defendant testified that the questioning in the patrol car "delayed the writing of the ticket and obtaining the information from dispatch." R.76:¶7. However, Defendant testified that the questioning *at the SUV* delayed the stop five minutes. R. 93: 84. He testified that he was in the patrol car answering questions 15 to 20 minutes, but he *did not* clarify whether the trooper had already requested the warrants check or whether the trooper was also completing the citation while questioning Defendant. *See* R. 93: 84. In support of its finding, the district court also found that the State "did not present the precise sequence concerning [the] questioning and the length of the traffic stop." R.76:¶7. It is true that the prosecutor did not elicit this information. However, the court itself questioned Trooper Bradford about the sequence and Bradford specifically testified that he asked Defendant questions about his travels "while [Defendant's] information [was] being run" through dispatch. R. 93: 78-79.

The question in exploitation analysis is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun v. United States*, 371 U.S 471, 488 (1963) (quotations and citations omitted). In answering that question, this Court considers three factors: "(1) 'the purpose and flagrancy' of the illegal conduct, (2) 'the presence of intervening circumstances,' and (3) the 'temporal proximity' between the illegal detention and consent." *Hansen*, 2002 UT 125, ¶ 64 (quoting *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975)). Contrary to the district court's conclusion, a consideration of those factors demonstrates that the consent search was obtained "by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun*, 371 U.S. at 488.

Only a few seconds elapsed from the end of the detention to the consent. This factor thus weighs against a finding of attenuation. However, "temporal proximity alone is not dispositive." *State v. Shoulderblade*, 905 P.2d 289, 291 (Utah 1995). And in this case, it is outweighed by the other two factors considered in exploitation analysis.

The purpose of Trooper Bradford's questions was not to obtain consent from Defendant, and the questioning in no way contributed to his consent. *See State v. Pebley*, 2005 UT App 312U (observing that "officer's illegal glance into

the garage window in no way aided the officers to subsequently gain [defendant's] consent, nor was 'the purpose of the illegal conduct to obtain consent'") (quoting *Hansen*, 2002 UT 125, ¶ 64). Indeed, it cannot be said that the questioning was "the 'but for' cause" of the consent. *State v. Worwood*, 2007 UT 47, ¶ 43, 164 P.3d 397. That fact alone dictates that the evidence "not be excluded as fruit" of the prolonged seizure. *Id.* Nor can the questioning be considered flagrant.[4] As noted, Trooper Bradford had indicia of drug trafficking and, in any event, such questioning about travel plans is widely accepted as permissible. The questioning was also de minimus, lasting at most only a few minutes.

Moreover, and contrary to the district court's ruling, R.81:¶6, any illegality in the questioning was sufficiently purged by intervening circumstances, to wit, the termination of the stop. The Ninth Circuit explained that "[i]ntervening circumstances that militate in favor of attenuation must be sufficiently important to ensure that potentially tainted evidence was 'come at by way of' some process other than the exploitation of an illegal search." *United*

---

[4] Although the district court concluded that the stop had de-escalated to a consensual encounter, it noted that "Bradford himself did not believe himself [that] defendant was free to leave but told defendant so because Bradford wanted defendant to believe that [he] was free to leave." R.81:¶6. However, the law is well-settled that an officer's "subjective view of the nature of the stop is not pertinent to [the Court's] analysis when his view was not communicated" to the defendant, as here. *State v. Tehero*, 2006 UT App 419, ¶ 10 n.2, 147 P.3d 506.

States v. Washington, 387 F.3d 1060, 1073-74 (9th Cir. 2004) (quoting *Wong Sun*, 371 U.S. at 487-88). Among the examples given by the Ninth Circuit was "release from custody." *Id.* That is what happened here.

After Trooper Bradford told Defendant to have a nice day and drive careful, Defendant exited the patrol car and began walking back to his vehicle. R.76:¶8. As correctly concluded by the district court, the detention had at that point "de-escalated to a consensual encounter," R.81:¶5, and Defendant acted in a manner consistent with that de-escalation. The de-escalation constituted a significant break in any possible causal connection between the questioning and the consent. *See Worwood*, 2007 UT 47, ¶ 47 (recognizing that an "intervening event [may] break the causal chain").

Additionally, Trooper Bradford did not ask for permission to search, but Defendant himself invited it—for the second time. *See* R. 93: 40-41, 72, 79-80 (R.76:¶¶7-8). This fact is strong evidence that Defendant's consent was "an unconstrained, independent decision that was completely unrelated" to any improper questioning. *Washington*, 387 F.3d at 1074 (quotations and citations omitted).

In summary, Defendant's consent to search was "'sufficiently attenuated to dissipate [any] taint'" that may have resulted from the questions about

Defendant's travel plans. *Worwood,* 2007 UT 47, ¶ 44 (quoting *Segura v. United States*, 468 U.S. 796, 815 (1984)).

CONCLUSION

For the foregoing reasons, this Court should reverse.

Respectfully submitted 13 February 2009.

MARK L. SHURTLEFF
Utah Attorney General

JEFFREY S. GRAY
Assistant Attorney General
Counsel for Appellee

CERTIFICATE OF SERVICE

I certify that on 13 February 2009, two copies of the foregoing brief were

☒ mailed ☐ hand-delivered to:

Gerry D'Elia
7620 Royal Street East, Ste. 202
P.O. Box 626
Park City, UT 84060

A digital copy of the brief will be provided within 14 days.

ADDENDUM

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SUMMIT COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. FRANK MARRONE, Defendant.	MEMORANDUM DECISION Case No. 0715003329 Honorable BRUCE C. LUBECK DATE: August 22, 2008

The above matter came before the court for decision on Defendant's Motion to Suppress.

BACKGROUND

An information was filed on November 14, 2007, charging defendant with possession of a controlled substance with intent to distribute, possession of drug paraphernalia and speeding, a traffic offense. After being bound over after a preliminary hearing on April 21, 2008, defendant filed a motion to suppress on April 29, 2008. An evidentiary hearing was held June 2, 2008, the court took the matter under advisement and allowed the parties to file further memoranda. Defendant filed a further memorandum June 19, 2008, and the State filed its response July 21, 2008. Oral argument was scheduled but postponed twice and eventually held August 18, 2008. The court took the issues under advisement.

FINDINGS OF FACT

1. Utah Highway Patrol Trooper Michael Bradford (Bradford) was on duty on November 8, 2007, when he observed a vehicle on I-80 traveling eastbound. The vehicle was speeding and by visual estimation Bradford opined the vehicle was traveling over 80 mph in the 65 mph zone. That speed was confirmed by radar, Bradford clocking defendant at 85 mph. Bradford was stationary at the time, and pursued defendant, activated his emergency equipment and stopped the vehicle at milepost 148.

2. Defendant was the driver and sole occupant. He immediately stated he was sorry, he knew he was speeding. Bradford confirmed that defendant was speeding and Bradford asked for license and registration and defendant produced a driver license and a registration and a rental agreement.

3. Bradford observed during the time defendant was obtaining the documents that the vehicle had a "lived in" appearance-there was a Camelback water device over the driver seat so the driver could drink water without pausing, there was a cooler on the rear passenger floor within access by the driver, there was a package or pack of Red Bull energy drink, there were several food snack items about the vehicle, and there was an incense odor in the vehicle.

4. The evidence was not clear on the precise timing and that

failure inures to the benefit of defendant. Sometime while still at the vehicle, and the State did not prove that this questioning was going on WHILE defendant was looking for his documents, Bradford asked where defendant was coming from and where he was going. Defendant said he had flown from Florida to California to help his mother with the California fires recently occurring there and was driving back to Florida. At about that time Bradford asked defendant to come back to Bradford's vehicle so he could get other information needed to write the ticket.

5. Defendant agreed and went to Bradford's police vehicle. There, and again the timing was not clarified by the State, Bradford learned more about the travel plans. That discussion in the police vehicle delayed the process of writing the ticket. Bradford needed social security information to complete the process and that was not available from the driver license.

6. In the police vehicle defendant stated that, in response to questions by Bradford, his mother had driven him to Reno, Nevada, where he rented the vehicle he was driving when he was stopped by Bradford. He was driving back to Florida but was first stopping in Wyoming to hunt. Bradford asked about the hunt and defendant did not know where he was going to hunt, what he was going to hunt, (what type of game), or how he was going to hunt (with firearm, bow and arrow, etc.). Bradford asked if he was going through an outfitter and defendant did not know.

Bradford asked how he was going to hunt without equipment and defendant asked Bradford if outfitters supplied the equipment. Defendant also said he was meeting two friends from North Carolina to engage in that hunt.

7. The court finds that this discussion necessarily delayed the writing of the ticket and obtaining the information from dispatch. While defendant so testified, the State did not dispel that testimony and did not present the precise sequence concerning questioning and the length of the traffic stop. Dispatch also advised Bradford that defendant had past arrests for drug trafficking. When defendant heard that dispatch advised Bradford of past arrests, defendant volunteered that Bradford could search his car or run a dog over it if he wanted.

8. Bradford gave the ticket to defendant, returned the other documents to defendant, and told him to have a nice day and drive carefully. Defendant got out of the police vehicle and began to return to his car. Bradford then got out immediately and asked defendant if he, Bradford, could ask a few more questions. Defendant said go ahead. Bradford asked if he was transporting any drugs, naming marijuana, cocaine, and others. Defendant said he was not, and again said Bradford could to ahead and look in the vehicle, and could bring a dog. In fact, Bradford had already called another trooper who was in the area on the same interdiction assignment who had a drug detection dog in his

vehicle, and that vehicle arrived at an unknown time.

9. The dog was utilized but no results were revealed by the testimony. Bradford observed two spare tires in the rear of the Chevrolet Trailblazer defendant had rented. Bradford asked about them and defendant said they were going on his camper, though the tires were old, did not match, and indeed had a different lug bolt configuration. There was also a recent sealant observable and so those tires were opened after a sound test. Marijuana was found in the two spare tires and the spare tire under the vehicle.

DISCUSSION and CONCLUSIONS OF LAW

1. Here the stop is not challenged and it was justified based on the admitted speeding. The actual search is not challenged and the only issue is whether there was sufficient objective suspicion to justify a detention beyond the traffic stop and whether the detention, if unlawful, tainted the consent and resulting search.

2. Under Utah law, as recently reflected in *State v. Baker, 2008 UT App 115,* a seizure occurs if in view of all the circumstances a reasonable person would have believed he was not free to leave. The State bears the burden of proving the

reasonableness of the officer's actions during an investigative detention. The officer may detain the driver to conduct a limited investigation of the circumstances that caused the detention. The detention, if it exceeds the reason for the original traffic stop detention, must be temporary and necessary and must be based on reasonable suspicion the officer can articulate. The court looks to the totality of the circumstances to determine if there is an objective basis for suspecting criminal activity and for a continued detention. "Investigative acts that are not reasonably related to dispelling or resolving the articulated grounds for the stop are permissible only if they do not add to the delay already lawfully experienced and do not represent any further intrusion on the [the detainee's] rights."

3. Here, obviously, the officer stopped the vehicle for traffic violations and in the legitimate course of that investigation observed facts that, to the officer, yielded suspicion sufficient to justify a further detention. Of course the legal question is not whether this officer believed there was sufficient basis for the detention, but it is an objective question. The observations of Bradford concerning the "lived in" appearance, to justify further questions about the travel plans, must of themselves amounted to reasonable suspicion to justify other questioning if that other questioning delays or extends the stop. Questioning defendant about his travel plans at roadside,

before entry into the police vehicle, necessarily delayed the traffic stop. That questioning about travel plans would be permissible IF it occurred during the gathering of the documents. The State did not demonstrate that such questions were asked while the documents were being gathered such that the questioning did not lengthen the stop beyond the traffic stop. Thus, that questioning amounted to impermissible questioning unless there was reasonable suspicion that justified such questions. The claim of the State must be that the observations about the appearance of the vehicle by themselves amounted to reasonable suspicion to believe there was criminal activity. The court cannot agree that such observations, though somewhat suspicious, legally qualified as reasonable suspicion. This trained officer no doubt believed the items he saw and their configuration were indicative of someone in a hurry to get from Point A to Point B and the reason for that hurry was because the delivery of drugs were involved. However, alone, those observations do not amount to reasonable suspicion that warranted further detention and further questions. Once the questioning began, the answers did indeed provide reasonable suspicion to justify further detention because those answers were clearly suspicious to a reasonable person.

4. After some questions about renting a vehicle to drive to Florida after renting it in Reno Bradford had defendant come back

to the police vehicle. The court cannot accept defendant's claim that such a request improperly extended the detention. While it in fact extended the detention clearly for the time needed to walk from defendant's vehicle to the police car, the court is of the opinion that such is permissible and reasonable if the traffic stop is reasonable. For officer safety, to be out of traffic and to more easily hear, an officer may ask a motorist detained lawfully for a traffic stop to enter the police vehicle to further deal with the traffic issues. However, there again the State has failed to show that the further suspicion developed by questioning in the police vehicle did not extend the stop. If Bradford had been able to have the conversation concerning the travel and hunting plans of defendant DURING the computer check and during the writing of the ticket, without extending the time needed to legitimately run those checks and complete those tasks, the questioning would be permissible. Here, the State did not show the court that the questions occurred actually during the record check process engaged in by Bradford. Thus, again, the information unveiled about the rather incredible travel plans and hunting plans was not obtained during a legitimate detention. The court may not find reasonable suspicion was developed during an unlawful detention. This detention was unlawful from the time when Bradford began to extend the stop by asking questions at roadside, and it became even more "unlawful" during the

conversation inside the vehicle.

5. Once Bradford returned the documents to defendant he was objectively free to leave because a reasonable person would believe, based on the totality of the circumstances, that he was free to end the encounter and depart. *State v. Hansen, 63 P.3d 659, 661 (UT 2002)*. The detention had de-escalated to a consensual encounter. While the court concludes the consent was voluntary, the consent was not effective.

6. If there is a prior illegality that taints the consent the consent is not effective. Here, the unlawful detention had just finished when Bradford returned the documents and told defendant he was free to leave. There were no intervening circumstances. Bradford told defendant he was free to leave but Bradford did not believe himself defendant was free to leave but told defendant so because Bradford wanted defendant to believe that defendant was free to leave. At that time, Bradford, based on the rather incredible stories, did have reasonable suspicion but again it had been developed during an unlawful detention. The purposes of the exclusionary rule are chiefly to deter police conduct that is improper in the view of prevailing law.

7. However, the "voluntary" consent given by defendant was obtained as a direct result of the conduct of Bradford in obtaining information improperly.

8. In summary, the factors observed by Bradford concerning

the state of the car and its "lived in" look did not by themselves justify other questioning about matters apart from the traffic stop when such questioning extended the length of the stop. That is because objectively those factors, while suspicious, do not under Utah law amount to reasonable suspicion that justified the asking of those further questions about travel plans if those questions further detain the suspect. Other factors may give such reasonable suspicion, but not these factors observed by Bradford alone. Thus, from that point on any further questions beyond the traffic stop questions were also improper as they delayed the stop and extended the time of the stop, and the later questions built upon the earlier improper questions and delay.

9. The State argues that the questions could be asked as they were designed to confirm or dispel the suspicion of Bradford. The court believes that is the wrong standard. The questioning itself is the delay and that delay must be justified by objective factors amounting to reasonable suspicion. The only factors present here before the questioning were the observations about the interior of the vehicle. Those were, as stated, somewhat suspicious but insufficient to justify further questioning that extended the stop. The questioning, again, was not *per se* unlawful but it was unlawful because of its timing and consequent delay.

9. Because the detention was unlawful, even though the consent was given "voluntarily," the consent was not legally voluntary because it came about based on the taint of the illegal detention and there were no factors that dissipated that taint. The consent was thus not legally voluntary.

The motion to suppress is GRANTED.

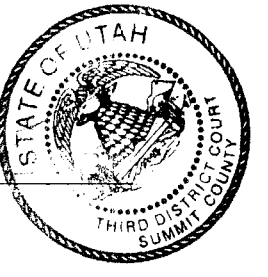
The case is set for a status conference September 15, 2008, at 8:30 a.m.

This Ruling and Order is the Order of the court and no other order is required.

DATED this 22 day of Aug, 2008.

BY THE COURT:

BRUCE C. LUBECK
DISTRICT COURT JUDGE



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 071500329 by the method and on the date specified.

METHOD	NAME
Mail	GERRY D'ELIA Attorney DEF 7620 ROYAL ST E STE 201 PARK CITY, UT 84060
By Hand	STATE OF UTAH

Dated this 22 day of August, 2008.

B. Mitchell
Deputy Court Clerk

STATE OF UTAH
THIRD DISTRICT COURT
SUMMIT COUNTY

LBind64